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## Can Our Shameful Prisons Be Reformed?

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David Cole, "Can Our Shameful Prisons Be Reformed?," *The New York Review of Books*, November 19, 2009, (reviewing Glenn C. Loury, with Pamela S. Karlan, Tommie Shelby, and Loïc Wacquant, *Race, Incarceration, and American Values* (2008); Paul Butler, *Let's Get Free: A Hip-Hop Theory of Justice* (2009) and Anthony C. Thompson, *Releasing Prisoners, Redeeming Communities: Reentry, Race, and Politics* (2008)).

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## Faculty Publications



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### Can Our Shameful Prisons Be Reformed?

The New York Review of Books, November 19, 2010.

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# Can Our Shameful Prisons Be Reformed?

NOVEMBER 19, 2009

by David Cole

*Race, Incarceration, and American Values*

by Glenn C. Loury, with Pamela S. Karlan, Tommie Shelby, and Loïc Wacquant  
Boston Review/MIT Press, 86 pp., \$14.95

*Let's Get Free: A Hip-Hop Theory of Justice*

by Paul Butler  
New Press, 214 pp., \$25.95

*Releasing Prisoners, Redeeming Communities: Reentry, Race, and Politics*

by Anthony C. Thompson  
New York University Press, 262 pp., \$39.00; \$21.00 (paper)



Charles Ommanney/Contact Press Images  
*An inmate at the state prison in Sugar Land,  
Texas, 2005*

## 1.

With approximately 2.3 million people in prison or jail, the United States incarcerates more people than any other country in the world—by far. Our per capita rate is six times greater than Canada's, eight times greater than France's, and twelve times greater than Japan's. Here, at least, we are an undisputed world leader; we have a 40 percent lead on our closest competitors—Russia and Belarus.

Even so, the imprisoned make up only two thirds of one percent of the nation's general population. And most of those imprisoned are poor and uneducated, disproportionately drawn from the margins of society. For the vast majority of us, in other words, the idea that we might find ourselves in jail or prison is simply not a genuine concern.

For one group in particular, however, these figures have concrete and deep-rooted implications—African-Americans, especially young black men, and especially poor young black men. African-Americans are 13 percent of the general population, but over 50 percent of the prison population. Blacks are incarcerated at a rate eight times higher than that of whites—a disparity that dwarfs other racial disparities. (Black-white disparities in unemployment, for example, are 2–1; in nonmarital childbirth, 3–1; in infant mortality, 2–1; and in net worth, 1–5<sup>1</sup>).

In the 1950s, when segregation was still legal, African-Americans comprised 30 percent of the prison population. Sixty years later, African-Americans and Latinos make up 70 percent of the incarcerated population, and that population has skyrocketed. The disparities are greatest where race and class intersect—nearly 60 percent of all young black men born between 1965 and 1969 who dropped out of high school went to prison at least once on a felony conviction before they turned thirty-five. And the incarceration rate for this group—black male high school dropouts—is nearly fifty times the national average.<sup>2</sup>

These disparities in turn have extraordinary ripple effects. For an entire cohort of young black men in America's inner cities, incarceration has become the more-likely-than-not norm, not the unthinkable exception. And in part because prisons today offer inmates little or nothing in the way of job training, education, or counseling regarding their return to society, ex-offenders' prospects for employment, housing, and marriage upon release drop precipitously from their already low levels before incarceration.

That in turn makes it far more likely that these ex-offenders will return to criminal behavior—and then to

prison. Meanwhile, the incarceration of so many young men means more single-parent households, and more children whose fathers are in prison. Children with parents in prison are in turn seven times more likely to be imprisoned at some point in their lives than other children. As Brown professor Glenn Loury puts it in *Race, Incarceration, and American Values*, we are “creating a racially defined pariah class in the middle of our great cities.”

The most dramatic effects of this incarceration are concentrated on the most disadvantaged—those who are not only African-American or Latino, but also poor, uneducated, and living in highly segregated ghettos. While roughly 60 percent of black high school dropouts have spent time in prison, only 5 percent of college-educated African-Americans have done so. The indirect consequences of such disparities, however, extend much further. Many people cannot tell whether an African-American is a dropout or college-educated—or, more relevant, a burglar or a college professor, as Harvard professor Henry Louis Gates found in July 2009, when he was arrested after trying to get into his own house. The correlation of race and crime in the public’s mind reinforces prejudice that affects every African-American.

Three recent books by scholars who happen to be black men eloquently attest to these broader effects of the racial disparities in our criminal justice system. For Loury, “mass incarceration has now become a principal vehicle for the reproduction of racial hierarchy in our society.” For George Washington University law professor Paul Butler, author of *Let’s Get Free: A Hip-Hop Theory of Justice*, “the two million Americans in prison represent the most urgent challenge to democratic values since the civil rights era.” And for New York University law professor Anthony Thompson, author of *Releasing Prisoners, Redeeming Communities: Reentry, Race, and Politics*, it is critical that we examine “the pervasive interplay of race, power, and politics that infuse and confuse our attitudes about crime.”

Butler expresses the personal character of this issue most urgently. Raised by a single mother in a poor black neighborhood on Chicago’s South Side, Butler graduated cum laude from Yale College and Harvard Law School, clerked for a federal judge, worked for a prestigious Washington law firm, and then became a federal prosecutor in the Justice Department’s elite unit fighting public corruption—an American success story. Yet he dresses, as he puts it, “in the current fashion, like a thug”; has a “nice-sized chip on [his] shoulder, afflicted with the black man’s thing for respect by any means necessary”; and “[doesn’t] like the police much, even though I work with them every day.”

More to the point, at the same time that Butler was a successful federal prosecutor, he found himself a criminal defendant in the District of Columbia’s Superior Court. Butler was arrested in connection with a petty dispute over a parking space that Butler owned but that a neighbor was “renting” out to others. The neighbor called the police and charged Butler with assault, and Butler was arrested, handcuffed, booked, and prosecuted. At his trial, a police officer lied on the stand, Butler’s landlord refused to testify on his behalf, and Butler himself let his anger get the better of him when he testified. The jury nonetheless acquitted him after ten minutes of deliberation. As Butler puts it:

The system worked for me—to the extent that you can describe a system as “working” when a man is arrested and made to stand trial for a crime he did not commit. At least I was not convicted, which makes me as grateful for my money, my defense attorney, my social standing, my connections, and my legal skills as for my actual innocence.

A few months after this experience, Butler chose to leave his job as a prosecutor. He explains, “My sense of justice has always been big and bulging. What my own personal prosecution expanded is my sense of injustice.” Butler now calls himself a “recovering prosecutor,” and argues that to be a prosecutor is to be “an active participant in a system that defines too many activities as crimes, enforces its laws selectively, and incarcerates far too many of its citizens.” As a law professor, Butler has devoted his life to advocating resistance to the criminal justice system as it stands today.

## 2.

Until 1975, the United States’ criminal justice system was roughly in line with much of Europe’s. For fifty years preceding 1975, the US incarceration rate consistently hovered around 100 inmates per 100,000; criminologists made careers out of theorizing that the incarceration rate would never change. Around 1975, however, they were proved wrong, as the United States became radically more punitive. In thirty-five years, the incarceration rate ballooned to over 700 per 100,000, far outstripping all other countries.

This growth is not attributable to increased offending rates, but to increased punitiveness. Being “tough on crime” became a political mandate. State and federal legislatures imposed mandatory minimum sentences; abolished or radically restricted parole; and adopted “three strikes” laws that exact life imprisonment for a third offense, even when the offense is as minor as stealing a slice of pizza. Comparing the ratio of convictions to “index crimes” such as murder, rape, and burglary<sup>2</sup> between 1975 and 1999 reveals that, holding crime constant, the United States became five times more punitive. Harvard sociologist Bruce Western estimates that the increase in incarceration rates since 1975 can take credit for only about 10 percent of the drop in crime over the same period.<sup>4</sup>

Much of the extraordinary growth in the prison and jail population is attributable to a dramatic increase in prosecution and imprisonment for drug offenses.<sup>2</sup> President Reagan declared a “war on drugs” in 1982, and the states eagerly followed suit. From 1980 to 1997, Loury tells us, the number of people incarcerated for drug offenses increased by 1,100 percent. Drug convictions alone account for more than 80 percent of the total increase in the federal prison population from 1985 to 1995. In 2008, four of five drug arrests were for

possession, and only one in five was for distribution; fully half of all drug arrests were for marijuana offenses.<sup>6</sup>

African-Americans have borne the brunt of this war. From 1985 to 1991, the number of white drug offenders in state prisons increased by 110 percent; the number of black drug offenders grew by 465 percent.<sup>7</sup> The average time served by African-Americans for drug crimes grew by 62 percent between 1994 and 2003, while white drug offenders served 17 percent more time.<sup>8</sup> Though 14 percent of monthly drug users are black, roughly equal to their proportion of the general population, they are arrested and imprisoned at vastly disproportionate rates: 37 percent of those arrested for drug offenses are black as well as 56 percent of those in state prisons for drug offenses.<sup>9</sup> Blacks serve almost as much time in prison for drug offenses (average of 58.7 months) as whites do for violent crimes (average of 61.7 months).<sup>10</sup>

What should be done about this? Lounry rightly demands that we first confront what those facts tell us about our political culture. Were we in John Rawls's "original position," with no idea whether we would be born a black male in an impoverished urban home, he asks, would we accept a system in which one out of every three black males born today can expect to spend time in jail during his life?<sup>11</sup>

If white male babies faced anything like such prospects, the politics of crime would look very different. We would almost certainly see this as an urgent national calamity, and demand a collective investment of public resources to forestall so many going to prison. Politicians would insist that we reduce criminal penalties, decriminalize nonviolent drug offenses, and promote alternatives to incarceration. The fact that there aren't such calls today—or that if there are, they go largely unheeded—suggests that our criminal justice system is sustainable only because its disparate effects leave the majority off the hook.

But is the majority really off the hook? In fact, the prison boom has high costs for all of us. A new prison opens somewhere in the United States every week. Imprisoning a human being in this country costs a minimum of \$20,000 a year, far more than tuition at any of our state universities. National spending on prisons and jails was \$7 billion in 1980; it is \$60 billion today. Several states now spend more on state prisons than state colleges. We literally cannot afford our political addiction to incarceration.

Moreover, the incarceration boom means that there is also now a boom in prisoners being released. In 2008, approximately 700,000 prisoners were released. At current rates of recidivism, 469,000 of them will be rearrested within three years. We all have an interest in helping this at-risk population avoid a return to a life of crime.



The war on drugs has by most accounts been a failure, and we are all paying the bill. In 2008, 1.7 million people were arrested for drug crimes.<sup>12</sup> Since 1989, more people have been incarcerated for drug offenses than for all violent crimes combined. Yet much like Prohibition, the war on drugs has not ended or even significantly diminished drug use. It has made drugs more expensive, and fostered a multibillion-dollar criminal industry in drug delivery and sales. Drugs have become more concentrated and deadly; twice as many people die from drugs today than before the war on drugs was declared. If anything, the war on drugs has probably increased the incidence of crime; about half of property crime, robberies, and burglaries are attributable to the inflated cost of drugs caused by criminalizing them.

More fundamentally, as citizens we all have a stake in the fairness and legitimacy of our criminal justice system for both moral and pragmatic reasons. The character of our nation is determined in significant part by how we treat the criminally accused. It is no accident that the Bill of Rights concentrates primarily on protecting the rights of those suspected of crime. These amendments were deemed necessary precisely because political majorities are likely to seek shortcuts on fairness when crime is alleged, even though fairness is fundamental to the integrity of the criminal justice system.

As a pragmatic matter, the legitimacy of the criminal justice system is essential because it encourages law-abiding behavior. If people believe in the basic legitimacy of a leader or regime or procedure, they are far more likely to abide by the rules. If, on the other hand, a system is seen as corrupt, unfair, or unjust, those subjected to it will be less inclined to respect it. A legal system that relegates the majority of our most disadvantaged populations to incarceration, and does next to nothing to help them avoid prison or to reintegrate into society upon release, invites disrespect—and crime.

### 3.

How do we escape the self-defeating cycle of crime and punishment? Anthony Thompson suggests that we focus on the neediest—the 700,000 or so prisoners who are released each year. Before the incarceration boom, the avowed purpose of criminal sentencing in America was rehabilitation. Prison sentences were often open-ended, with the idea being that a successful course of rehabilitation would warrant an earlier release. In the 1970s, however, the nation began to sour on rehabilitation, and over the next two decades state and federal authorities eliminated most efforts to educate, train, and counsel prisoners with a view toward preparing them for their return to society.

Thompson argues that when 700,000 prisoners are being released each year, we ignore at our peril their reintegration into our society. A stable home, job, and health are strong predictors of law-abiding behavior. But incarceration makes stability much more difficult to obtain in all these respects. Public housing laws often bar offenders, and private landlords routinely discriminate against them. Federal and state laws broadly prohibit ex-offenders from hundreds of jobs, often without any rational justification, and even where no bar exists, private employers are less than eager to hire them. Prisoners who enter prison without physical and mental illnesses often develop them while inside. Yet as Thompson demonstrates, society does virtually nothing to help ex-offenders find homes, jobs, or health care—thereby virtually guaranteeing a cycle of recidivism.

Thompson proposes a variety of sensible reforms—eliminating laws that irrationally bar ex-offenders from jobs and housing, providing health care and counseling to help smooth the transition back to life outside of prison. But the question he leaves unanswered is the most difficult one: Where is the political impetus for such reform? If Americans are skeptical about the government providing health insurance for the law-abiding, what is going to make them support it for ex-offenders? And if we do not invest in sufficient job training or public housing for those who have never been imprisoned, why would we do so for those who have violated criminal laws?

Butler offers a broader set of proposals. Some are, like Thompson's, eminently sensible. He calls for decriminalizing the possession of small amounts of drugs for personal use, for example. Several other nations, including the Netherlands, Spain, France, and Mexico, have done just that, without any evident rise in drug use. And he recommends that we treat drugs as a public health issue, adopting "harm reduction" strategies such as needle exchange.

Butler also suggests that we offer economic incentives to encourage young people to stay in school. In view of the number of high school dropouts who land in prison, if we can keep young people in school, we may be able to keep them out of prison. From a purely economic perspective, it takes a lot less money to induce an at-risk young man to remain in school than it does to lock him up for a year. Similarly, Butler's proposal that we invest in eliminating sources of lead poisoning makes economic sense, since exposure to lead in children turns out to be highly correlated with criminal behavior subsequently. Butler also calls for a general reduction in criminal sentences, and for the early release of nonviolent offenders, many of whom should never have been locked up in the first place.

Other recommendations are more questionable. Butler calls on juries, for example, to engage in "nullification" of the criminal law to protest mass imprisonment. Because juries need not give reasons for their decisions, they have the discretion to acquit even where the state has proved criminal behavior beyond a reasonable doubt. Butler proposes that jurors consciously adopt the tactic, as a kind of civil disobedience, to resist mass incarceration—but only in cases involving victimless crimes.

This proposal has many problems. First, jurors act episodically and in secret. Thus, unlike civil disobedience, acts of nullification are unlikely to have a galvanizing effect. Second, to engage in a conscious strategy of nullification will often require dissembling, itself criminal behavior. If a potential juror admits that she will not vote to convict no matter how strong the evidence is, a judge will not let her sit on the jury. Thus, to engage in this practice may require citizens to lie. It is not wise to build a movement for social change on deceit. Third, it is often difficult to know whether a crime is in fact "victimless." Prosecutors often pursue relatively low-level offenders in the hope that they can "encourage" them to identify wrongdoers further up the chain of command. Even if the foot soldier is not engaged in activity that harms victims, an organized crime ring may have many victims. How is a juror to assess whether a given prosecution is a legitimate part of such a broader investigation?

Butler's advocacy of jury nullification is probably best understood as a symbolic act of resistance rather than a concrete solution to the problems of race and class inequality. But even as a symbol, it seems flawed, and unlikely to attract the kind of broad support that would be necessary to build a meaningful consensus for real reform.

### 4.

It is, after all, real reform that we need. On that front, the biggest challenge is that the very demographics that make the pattern of crime and punishment in America so skewed against blacks and Latinos also make it all too easy for politicians, and the majorities they represent, to adhere to an unthinking "tough on crime" attitude. Senator Jim Webb has dared to buck that trend, proposing a national commission to study inequality in the criminal justice system. Such an effort would bring welcome, and long overdue, attention to the issue, and might impel us to do something about the problems we have all too complacently ignored.

Recent years have shown some softening in the politics of crime. Between 2004 and 2006, twenty-two states adopted reforms that shortened criminal sentences. In 2004, New York amended its notoriously draconian Rockefeller-era drug laws, and revised them again this year to make low-level offenders eligible for shortened sentences, or in some cases for treatment programs instead of prisons. In 2005, Connecticut eliminated the disparity in sentences for crack and powder cocaine under its state law, and in 2007, the Supreme Court ruled that federal judges could depart from strict “sentencing guidelines” and impose more lenient sentences based on concerns about the racial disparities caused by the different treatment of crack and powder cocaine under federal law. In April 2009, the Obama administration came out in favor of eliminating the crack–powder disparity altogether in federal law.

Several states have expanded drug treatment options as alternatives to prison for drug offenses. A RAND Corporation study estimates that treatment is fifteen times more effective at reducing drug-related crime than incarceration.<sup>13</sup> An increasingly popular way of diverting drug offenders to treatment is through the use of “drug courts,” in which judges oversee treatment programs and dismiss criminal charges upon a defendant’s successful completion of treatment. The first drug court was introduced in 1989; as of 2007, there were 1,662 such courts across the country.<sup>14</sup>

Thompson’s argument that reformers should give special attention to those being released from prison because they otherwise pose a significant risk of recidivism has also gained adherents. Rehabilitation has hardly been revived, but under the rubric of “re-entry” into society, states and the federal government are increasingly promoting programs that address the serious problems that ex-offenders face. As Helen Epstein has shown, “restorative justice” efforts, which seek to facilitate reintegration through counseling that encourages offenders to take personal responsibility for their wrongdoing, have demonstrated positive results.<sup>15</sup> Still, while acknowledging personal responsibility is undoubtedly important, it won’t do the trick without a place to live, a job, and strong family ties.

States have also increasingly sought to ameliorate the effects of laws that deny ex-felons the right to vote. “Felony disenfranchisement” laws render large numbers of African-American men ineligible to vote, and extend the racial disparities in the criminal justice system into electoral politics. As a result of these laws, one in eight black men of voting age is ineligible to vote. The laws also frustrate reintegration, for they imply is that an ex-offender can never be a full citizen. Since 1997, nineteen states have amended their laws to mitigate these restrictions and give ex-offenders more opportunity to regain their eligibility to vote.<sup>16</sup> With five million potential voters still affected, there is much more work to be done, but the trend line is positive.

Finally, several states, including California and Texas, have sought to reduce the drain on their budgets caused by their prisons by identifying nonviolent offenders who can be released early without posing a threat to the community. Under a program called “Justice Reinvestment,” spearheaded by the Council of State and Local Governments and supported by the US Justice Department, some states, including Connecticut, Kansas, Vermont, and Texas, have also redirected some of the money saved by early release to the high-risk neighborhoods from which so much of the imprisoned population comes. The idea is that if states invest in these communities, they may save money in the long run by reducing the numbers of community members who commit crimes.

The impetus for these reforms has more often than not been economic. States simply cannot afford to continue devoting huge and growing portions of their dwindling budgets to prisons and jails, and are increasingly interested in determining whether there are people in prison who need not be there. Since two thirds of prisoners are incarcerated for nonviolent offenses, and many of those for nonviolent drug offenses in particular, these reforms make clear budgetary sense.

The demographic character of the prison population (and of the communities most at risk of future incarceration) means that reform need not be motivated by concern about race and class disparities in order to have a disproportionate benefit for African-Americans and Latinos. Virtually any measure that reduces reliance on prisons will disproportionately benefit African-Americans and Latinos, even if it is motivated by the bottom line, not justice.

At the same time, our addiction to punishment should be troubling not only because it is costly and often counterproductive, but because its race and class disparities are morally unacceptable. The most promising arguments for reform, therefore, must appeal simultaneously to considerations of pragmatism and principle. The very fact that the US record is so much worse than that of the rest of the world should tell us that we are doing something wrong, and the sheer waste of public dollars and human lives should impel us toward reform. But as the authors of these three books make clear, we will not understand the problem fully until we candidly confront the fact that our criminal justice system would not be tolerable to the majority if its impact were felt more broadly by the general population, and not concentrated on the most deprived among us.

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1. Bruce Western, *Punishment and Inequality in America* (Russell Sage Foundation, 2006), p. 26. ↵
  2. Western, *Punishment and Inequality in America*, p. 18. ↵
  3. Index crimes are the eight crimes the FBI tracks to produce its annual crime index. They are willful homicide, forcible rape, robbery, burglary, aggravated assault, larceny over \$50, motor vehicle theft, and arson. ↵
  4. Western, *Punishment and Inequality in America*, p. 187. ↵

5. Western, *Punishment and Inequality in America*, p. 50. ↵
6. FBI, *Crime in the United States, 2008*, Arrest Table, available at [www.fbi.gov/ucr/cius2008/arrests/index.html](http://www.fbi.gov/ucr/cius2008/arrests/index.html). ↵
7. Marc Mauer, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment* (Sentencing Project, 1997), p. 10. ↵
8. Marc Mauer and Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society* (Sentencing Project, 2007), pp. 22–23. ↵
9. Mauer and King, *A 25-Year Quagmire*, pp. 2, 19–20. ↵
10. Mauer and King, *A 25-Year Quagmire*, p. 2. ↵
11. The Sentencing Project, "Facts About Prison and Prisoners" (April 2009) (citing the Bureau of Justice Statistics), available at [www.sentencingproject.org/PublicationDetails.aspx?PublicationID=425](http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=425). ↵
12. FBI, *Crime in the United States, 2008*. ↵
13. Jonathan P. Caulkins, C. Peter Rydell, William Schwabe, and James Chiesa, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?*, (RAND, 1997), pp. xvii–xviii. ↵
14. BJA Drug Court Clearinghouse, American University, *Drug Court Activity Update: Composite Summary Information* (January 2007); available at [www1.spa.american.edu/justice/documents/1956.pdf](http://www1.spa.american.edu/justice/documents/1956.pdf). ↵
15. Helen Epstein, "America's Prisons: Is There Hope?," *The New York Review*, June 11, 2009. ↵
16. Ryan S. King, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997–2008* (Sentencing Project, 2008), p. 1. ↵